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No. 94-1990

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ANR PIPELINE COMPANY AND
COLORADO INTERSTATE GAS COMPANY,

Petitioners,

v.

THE STATE BOARD OF EQUALIZATION AND
THE OKLAHOMA TAX COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION

* W.A. DREW EDMONDSON
Attorney General of Oklahoma

DOUGLAS F. PRICE
Assistant Attorney General

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

DAVID ALLEN MILEY
Assistant General Counsel
OKLAHOMA TAX COMMISSION
2501 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105
(405) 521-3141

Counsel for Respondents
** Counsel of Record*

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QUESTION PRESENTED

May the State of Oklahoma assess, for property tax purposes, pipelines at an assessment percentage different than that applied to airlines and railroads when pipelines are in a tax class separate and distinct from airlines and railroads.

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On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Oklahoma Supreme Court entered on December 20, 1994.

STATEMENT OF THE CASE

The facts of the case are stated in the Opinion below and in the Petition. Summarized, the basic facts of the case are as follows:

In Oklahoma, airlines, railroads and other public service corporations are valued for purposes of ad valorem taxation by the Oklahoma State Board of Equalization. The Board assesses ad valorem taxes by 1) establishing a fair cash value for property and 2) fixing an assessment percentage for the property. Oklahoma law provides that "in determining the assessment ratio for all air carrier property and all railroad property, the State Board shall only consider the ratio of the aggregate assessed value to the fair cash value of the locally assessed commercial/industrial real property of the state." 68 O.S. 1991 § 2864(C).

In June, 1994, the State Board adopted an assessment ratio of 12.08 percent for airline and railroad property. In July, the Board adopted a ratio of 22.85 percent for public service corporations (including pipelines).

An original proceeding was filed with the Oklahoma Supreme Court claiming that 1) the assessments violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, (2) the assessments violate Article X, Section 5 of the Oklahoma Constitution which requires uniform taxation within a tax class, and (3) the assessments violate Sections 2803(C) and 2847 of the Oklahoma Ad Valorem Tax Code, which require uniform treatment in ad valorem taxation. The relief sought was to have the same assessment ratio applied to protestant's property that was applied to railroad and airline property.

On December 20, 1994, the Oklahoma State Supreme Court found that under Oklahoma law railroads and airlines are a distinct subclass of public service corporations whose property may, under the Oklahoma Constitution, be valued with a different tax assessment ratio. The Court also held that Oklahoma classification of railroads and airlines presented no federal equal protection violation. Additionally, the Court found that, under Oklahoma law, there was no violation of the intra-class equalization provisions.

Summary of Argument

The State of Oklahoma has established airlines and railroads as a distinct subclass of property for purposes of ad valorem taxation. Equal protection only requires that similarly situated taxpayers be treated the same. The Oklahoma Supreme Court has found that, under Oklahoma law, airlines and railroads are not in the same tax class and, therefore, not similarly situated to other public service corporations (including petitioners). Therefore, where the State Board of Equalization applied differing assessment ratios to petitioners and airlines and railroads, it was not in violation of the equal protection provisions of the federal constitution.

Oklahoma's creation of a distinct class for airlines and railroads was in response to federal law, and was entirely reasonable and in conformity with the equal protection tests enunciated by this Court. Petitioners are attempting through a distortion of the equal protection concept to receive relief that, to date, Congress has granted only to airlines and railroads, and not to other public service corporations (including petitioners).

REASONS FOR DENYING THE WRIT

I. PROPERTY TAX RELIEF FOR PIPELINES IS FOR CONGRESS AND NOT THE COURTS

As the United States Supreme Court has recognized on many occasions, states have broad powers to impose and collect taxes, and the state may divide different kinds of property into classes and assign to each class a different tax burden as long as those divisions and burdens are reasonable. *Allegheny Pittsburgh Coal Company v. County Commission of Webster County, West Virginia*, 448 U.S. 336, 344, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989).

In *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), the United States Supreme Court held:

> The State may impose different specific taxes upon different trades and professions, and may vary the rate of excise on various products.

In *Allegheny*, the Supreme Court recognized that states may properly classify property on the basis of ownership, and tax such classifications at different rates:

> It [the state] might, for example, decide to tax property held by corporations, including petitioners, at a different rate than property held by individuals. [cites omitted] In each case, '[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' *Brown - Forman*

> *Company v. Kentucky*, 317 U.S. 563, 573, 30 S.Ct. 578, 580, 54 L.Ed.2d 883 (1910).

448 U.S. at 344, 109 S.Ct. at 638, 102 L.Ed.2d at 697.

Under Article X, Section 22 of the Oklahoma Constitution, the State of Oklahoma recognizes the ability of the state to establish classifications for property tax purposes. The Constitution provides:

> Nothing in this Constitution shall be held, or construed, to prevent the classification of property for purposes of taxation; and the valuation of different classes by different means or methods.

In its decision the Oklahoma Supreme Court found the Oklahoma Legislature had established four classes of property for ad valorem tax purposes. The court found that air carrier and railroad property was distinct from public service corporation property (such as pipelines) and that there was no requirement of tax ratio equality under either the federal or Oklahoma Constitution.

To prevent discriminatory taxation of railroad property by the states, Congress enacted the Railroad Revitalization and Regulatory Reform Act (the 4-R Act), 49 U.S.C. § 11503. That Act, among other things, prohibits the states from taxing railroad property at a value that has a higher ratio to true market value than the assessed value of other "commercial and industrial property", in the same assessment jurisdiction. Airline property, under the provisions of the Tax Equity and Fiscal Responsibility Act ("TEFRA"), 49 U.S.C. § 40116, is provided similar protection.

The federal requirements that railroad and airline properties be taxed at no higher ratios than those used to assess other "commercial and industrial property" in the same assessment jurisdiction, made it unlawful for Oklahoma to continue to classify and tax railroad and airline property as public service corporation property. This is so because while public service corporation property certainly comes within the category of "commercial and industrial property", public service corporation property constitutes merely a statutorily defined sub-set of the state's larger set "commercial and industrial property". Non-public service commercial and industrial property is assessed by local county assessors as either real or personal property.

In recognition of the requirements of federal law, and the supremacy clause requirement that the state fully comply with federal law, the Oklahoma Legislature created the air carrier and railroad property class. This was accomplished by the enactment of 68 O.S. § 2864(C). ,

In this case, as the Oklahoma Supreme Court found, the classification of railroad and airline property, for tax purposes, is more than reasonable. The classification is based upon the special protection afforded property of such entities by federal law, protection which pipelines for over a decade have been trying to secure from Congress. *In the matter of the Appeal of ANR Pipeline Company*, 866 P.2d 1060, 1066-67 (Kan. 1994), cert. denied 115 S.Ct. 296 (1994).

Petitioners want, under the guise of equal protection, to be afforded the same tax ratio applicable to airlines and railroads. To grant such relief would, in effect, extend the provisions to 4-R and TEFRA to entities outside the scope of federal protection.

The Oklahoma Supreme Court rejected petitioner's assertion that equal protection mandated the same tax treatment for airlines, railroads and pipelines. To grant petitioner the relief sought this Court would have to conclude that 4-R and TEFRA, in essence, eliminated the public service class of property created by the Oklahoma Constitution. Such a holding would destroy Oklahoma's classification system, at least as applied to public service corporations.

This Court has been hesitant to extend the provisions of a federal statute that preempts the state's taxation authority beyond its evident scope. *Oregon Revenue Department v. ACF Industries Inc.*, 510 U.S. _____, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994). The Oklahoma Supreme Court recognized the supremacy of federal law and determined that Oklahoma's classification of railroads and airlines as a distinct class for ad valorem taxation purposes was consistent with equal protection principles articulated by this Court. However, the Oklahoma Supreme Court limited the preemptive effect of TEFRA and 4-R to its intended beneficiaries, namely airlines and railroads. By creating the airline and railroad subclassification of property the State of Oklahoma has avoided discrimination while at the same time maintaining its tax structure as to entities not within the ambit of federal protection.

Petitioners are attempting to obtain from the judiciary what they have been unable to obtain from Congress. It is the prerogative of Congress, under its commerce powers, to determine whether pipelines should receive the same treatment under federal laws as Congress has provided airlines and railroads. The Oklahoma Supreme Court

properly rejected petitioner's attempt to obtain property tax relief through abrogation of the Oklahoma tax classification system and, for that reason, this Court should deny the Petition for Writ of Certiorari.

II. THE DECISION OF THE OKLAHOMA SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER STATE COURT OF LAST RESORT.

Petitioners argue that the decision of the Oklahoma Court conflicts with the decision of the Nebraska Supreme Court in *Northern Natural Gas Company v. State Board of Equalization and Assessment*, 443 N.W.2d 249 (1989), cert. denied 493 U.S. 1078 (1990). The Oklahoma Supreme Court found a vital distinction between the facts of *Northern Natural Gas* and this case. The distinction is that in *Northern* the Nebraska board treated taxpayers of the same class differently. The Nebraska Constitution requires that "taxes shall be levied by valuation uniformly and proportionally upon all taxable property." Neb. Const. art. VIII, § 1. A careful analysis of the *Northern Natural Gas* case reveals that pipeline property was required to be equalized with railroad property under this provision of the Nebraska Constitution regardless of the ramifications of 4-R or TEFRA.

There is a vital distinction between the Oklahoma and Nebraska ad valorem tax systems. The Oklahoma Constitution permits the legislature to establish different tax classes in which property can be assessed differently. Okla. Const. art. X § 22. Airlines and railroads are in a

legislatively-created subclass of public service corporation property. Nebraska has a single class of property for assessment purposes, and all property is entitled to uniform treatment under state law. Oklahoma only requires uniform tax treatment within constitutionally-prescribed classes. Under the Oklahoma system, public service property (including pipelines) constitutes a distinct class of property and airlines and railroads constitute another class of property. Under the 4-R and TEFRA Acts, airlines and railroads are required to be equalized with commercial and industrial property. In order to comply with the provisions of the 4-R and TEFRA Acts requiring equalization with commercial and industrial property, Oklahoma, unlike Nebraska, had the ability to create a subclass for ad valorem purposes. This fundamental distinction, recognized by the court below, sets this case apart from the Nebraska case and explains any perceived inconsistency.

The Oklahoma Supreme Court was more persuaded by case law from Kansas, Alabama and Tennessee. Courts in those states have held that legislative tax classifications of railroads and airlines on one hand and other entities on the other hand, did not violate the federal equal protection clause. In the Kansas case, *Appeal of ANR Pipeline Company*, 866 P.2d 1060 (Kan.1994), cert. denied 115 S.Ct. 296 (1994) the Kansas Supreme Court rejected a pipeline's request to have its real property assessed on the same basis as railroad property. In the ANR case the Kansas Supreme Court was faced with the situation wherein real and personal property owned by public utilities was to be assessed at 30 percent of its fair cash value. Pursuant to Kansas law, both *ANR* and railroads are public utilities. The Kansas Supreme Court found that 4-R

required that railroad property be assessed at no higher rate than commercial or industrial property, and that railroad property was thereby made an exception to the subclass to which public utility property was assigned. Id. at 1065. At page 1066 of its Opinion the Kansas Court found that 4-R placed limitations on state taxation of railroad property and that "there can be little doubt that this is a preemption." The Court further stated:

> If this is not a preemption, the 4-R Act is just a piece of paper suggesting railroads should be treated like other commercial and industrial property and that the enforcement section thereof is surplusage. Clearly, that was not the Congressional intent in enacting the 4-R Act.

In *Federal Express Corp. v. Tennessee State Board of Equalization*, 717 S.W.2d 873 (Tenn.1986), the Tennessee Supreme Court considered a taxpayer's challenge to the assessment of its property at the 55 percent rate applicable to public utility property rather than the 30 percent rate applicable to commercial and industrial property. In rejecting the contention that the equal protection clause forbade the state from assessing taxpayer's property at the rate applicable to utility property while assessing railroads at the lower rate applicable to commercial and industrial property, the Court reasoned that the 4-R Act preempted the state's classification of railroads and provided that they should be taxed as other commercial and industrial property is taxed, leaving in effect the state's tax treatment of other public utilities.

In the *State of Alabama v. Colonial Pipeline*, 471 So.2d 408 (Ala.Civ.App.1984), appeal denied 474 U.S. 936 (1985), the Alabama Court of Civil Appeals considered a pipeline's challenge to the assessment of its property at the highest applicable rate that was prescribed for public utility property. As in this case, the property of railroads have been assessed at a lower rate than the rate applicable to the pipeline's property because of the requirements of the 4-R Act. In an opinion rejecting the pipeline's objection to its assessment at the public utility rate, the court dismissed the suggestion that disparate treatment of pipelines, on the one hand, and railroads, on the other, would violate the equal protection clause even though the property of the pipelines and railroads was included within the same property tax classification category under state law. The Court, citing the supremacy of federal law, found that the 4-R Act preempted the state classification system as applied to railroads but left it in place as applied to pipelines.

Both the Tennessee and Alabama courts determined that 4-R had preempted application of certain state taxing schemes to railroads. However, the courts recognized that this preemption went only as far as the intent of the federal statute, which was to prohibit discriminatory taxation of railroad real and personal property by state and local property tax laws.

Nebraska, unlike Oklahoma, has not separately classified public utility property and was required to equalize railroad property with commercial and industrial property under state law. As stated above, Oklahoma has a different system of taxation, and its legislature is permitted to establish different tax classes in which different property can be valued

differently. Oklahoma's tax classification scheme is similar to those states whose courts have held that legislative tax classification of railroads and airlines, on the one hand, and other entities on the other hand, did not violate the federal equal protection clause. The decision of the Oklahoma Supreme Court is consistent with courts in Kansas, Alabama and Tennessee. The Nebraska decision is based upon application of the provisions of Nebraska law, which are not analogous to the Oklahoma situation. For that reason, petitioners have not shown the court that this case is inconsistent with the Nebraska case.

III. THE DECISION OF THE OKLAHOMA SUPREME COURT DOES NOT CONFLICT WITH EQUAL PROTECTION DECISIONS OF THIS COURT.

When a litigant challenges a governmental classification under the equal protection clause, a court must first determine the appropriate standard of review. Determining the proper standard of review is essential because the level of scrutiny applied often effectively determines whether a challenged classification is upheld. The most deferential standard of review is the rational relationship test. This test is typically used to analyze economic regulations not involving suspect classes or fundamental rights. Under this test, a challenged classification "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). The standard of review under the equal protection clause is especially deferential in the context of classifications

made by complex tax laws. *Nordlinger v. Hahn*, 505 U.S._____, 112 S.Ct._____, 120 L.Ed.2d 1 (1992). Under the rational relationship test, a court will uphold a challenged classification so long as it bears a rational relationship to a governmental objective not prohibited by the Constitution. The Oklahoma Supreme Court found that the legislature was required to recognize the supremacy of federal law, and it responded by creating the railroad and airline subclass. The Oklahoma Supreme Court found that creation of the subclass was neither arbitrary nor irrational and that creation of the class was consistently with the "large leeway" states are given in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. *Lehnhausen v. Lake Shore Auto Parts Company*, 410 U.S. 356, 935 S.Ct. 1001, 35 L.Ed.2d 351, (1973). The Court found that the classification furthered a legitimate state interest by bringing Oklahoma's ad valorem tax scheme into compliance with federal law.

In *Nordlinger v. Hahn*, 505 U.S. ____, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), this Court upheld California's constitutional provision requiring an "acquisition value" system of taxation, finding it rationally based.

This Court, in *Allegheny Pittsburgh Coal Company v. County Commission*, 488 U.S. 336 (1989), prohibited the practice of a West Virginia tax assessor of assessing recently purchased property at its purchase price, while making only minor adjustments in the assessments of property that had not recently been sold, in violation of West Virginia's constitutional provision requiring all property to be taxed at a uniform rate statewide according to its current market value. This was not a 4-R or TEFRA case and has nothing to

do with a state's compliance with the provisions of those federal laws.

As a matter of United States constitutional law, states enjoy a wide latitude of discretion in establishing classifications for property tax purposes and, judicial interference is only justified when a classification is unreasonable or arbitrary. In the case at hand, the classification of railroad and airline property, for tax purposes, is more than reasonable. The classification is based upon the special protection afforded property of such entities by federal law, the protection which pipelines over a decade have been trying to secure from Congress. *Appeal of ANR Pipeline Company*, 866 P.2d 1060, 1066-67 (Kan.1994).

Equal protection is not even implicated because equal protection considerations are only implicated when those claiming that their rights have been violated or are similarly situated to those who are treated more favorably. *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 98 S.Ct. 1404, 22 L.Ed.2d 739 (1969). In this case, despite the assertions in their petition, petitioners are not similarly situated to airlines and railroads because they do not enjoy special protection from Congress, protection which the states, under the supremacy clause, must recognize. Petitioners urge that to assess their property for ad valorem tax purposes at a rate higher than railroad and airline property, violates the equal protection clause. This position wholly disregards the effect of federal legislation and traditional concepts of tax policy.

CONCLUSION

In 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act ("4-R"). This Act had as its purpose, the elimination of discriminatory taxation of railroad real and personal property by state and local property tax laws, and to promote the revitalization of the railway system nationwide. *Clinchfield Railroad Company v. Lynch*, 784 F.2d 545, 551 (4th Cir.1986). Airlines are granted similar property tax protection under TEFRA. The Oklahoma Supreme Court was correct wherein it found that there was nothing irrational or arbitrary about Oklahoma classification of airlines and railroads as distinct from public service corporations (including pipelines) because only airlines and railroads have received the special protection afforded by federal law. The Oklahoma Legislature has recognized the effect of federal law and established a classification for taxpayers protected thereby. However, the legislature and State Board of Equalization have not illegally discriminated against petitioners because they are outside the scope of federal protection and are not, therefore, similarly situated to airlines and railroads.

This case is not appropriate for Supreme Court review because the opinion of the Oklahoma Supreme Court is not in conflict with opinions of other appellate courts, nor of opinions of this Court. The equal protection questions raised in petitioner's petition have been disposed of in the Kansas *ANR* case. The Oklahoma Supreme Court made the correct ruling based on Oklahoma law. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

*W. A. DREW EDMONDSON
Attorney General of Oklahoma

DOUGLAS F. PRICE
Assistant Attorney General

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

DAVID ALLEN MILEY
Assistant General Counsel
Oklahoma Tax Commission
2501 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105
(405) 521-3141

Counsel for Respondents
**Counsel of Record*